Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

PAUL KAMIENSKI,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

Does petitioner have a constitutional and due process right to be notified and be actually present and be given the opportunity to be heard at a proceeding brought by the State of New Jersey during a pre-trial conference to remove his retained counsel for reasons of alleged conflict of interest?

And, further was petitioner deprived of a fair trial when the removed attorney remained in control of the case, selected and retained the replacement lawyer for petitioner to his prejudice?

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No.

In The

Supreme Court of the United States

October Term, 1993

PAUL KAMIENSKI,

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vs.

STATE OF NEW JERSEY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

PETITION FOR A WRIT OF CERTIORARI

Paul Kamienski hereby petitions for a writ of certiorari to review the judgement of the Supreme Court of New Jersey denying his application without evidentiary hearing to that court for post-conviction relief alleging failure to be present at a critical stage of the criminal proceedings against him, to wit; a proceeding to remove his retained lawyer on grounds of alleged conflict of interest.

OPINIONS BELOW

The opinion of Hon. Donald E. Campbell denying petitioner's application for post-conviction relief pursuant to New Jersey Rules Governing Criminal Practice R. 3:22, dated November 9, 1992 (Appendix 6a).

The opinion (not for publication), of the Superior Court of the State of New Jersey, Appellate Division dated October 19, 1993 affirming the opinion of Judge Campbell (Appendix 2a).

The denial by the New Jersey Supreme Court of petitioner's application for certification to that court dated January 25, 1994 (Appendix la).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

And further, the Fourteenth Amendment (due process) to the United States Constitution guarantees this right to all citizens of the United States.

STATEMENT OF THE CASE

Petitioner was indicted by a New Jersey grand jury with two others on October 14, 1987 and charged with two counts of murder committed during the commission of a robbery and related narcotics charges.

Trial began on October 18, 1988 and ended on November 18, 1988 with a jury verdict finding petitioner and co-defendants guilty of two murder counts, during the commission of a robbery and conspiracy to possess cocaine with intent to distribute.

Thereafter and on December 21, 1988 the presiding judge (Perskie, J.), entered a judgement of acquittal as to petitioner and one other defendant on the murder charges but let stand the remaining guilty verdicts. As a result of the remaining guilty verdicts, petitioner was sentenced to consecutive terms of imprisonment of twelve years together with parole disqualifiers of six and four years.

Pursuant to an appeal, the state Appellate Division affirmed the guilty verdicts and reinstated the murder judgements of the verdict. *State v. Kamienski,* 254 N.J. Super. 75, 607 A.2d 78. Certification to the Supreme Court of New Jersey was denied on June 23, 1992.

On April 10, 1992, petitioner was sentenced to 30 years to life (2 counts concurrent) and a 12 year consecutive sentence.

On July 7, 1992 petitioner petitioned the court pursuant to Rule 3:22 (post-conviction relief) for a new trial and on November 9, 1992, petition was denied without evidentiary hearing.

An appeal to the Superior Court of the New Jersey Appellate Division of the denial of post-conviction relief was denied in a per curiam (not to be published) opinion.

Certification to the Supreme Court of New Jersey was denied on January 25, 1994.

This case presents for review substantial questions of constitutional law and, we believe, a case of first impression to determine whether petitioner had a constitutional right to be present and be given notice of a pre-trial conference and opportunity to be heard at such a proceeding where the State sought to remove his retained attorney.

Such proceeding alleged conflict of retained attorney due to his alleged prior representation of a State's witness and allegations of unethical or illegal conduct in representing both said witness and petitioner in unrelated, but relevant, drug charges. There appears to be no reported criminal case where removal of or attempted removal of a defendant's attorney occurred in his absence.

On July 12, 1988 the State formally made a motion to determine whether a conflict of interest existed as to the representation of petitioner by Miles Feinstein, Esq., his retained attorney. Mr. Feinstein had been representing the petitioner approximately four years on the matters which led to his indictment, subsequent conviction and sentence. The motion to remove the attorney was heard approximately one month prior to trial.

In his certification the prosecutor alleged that he advised the retained lawyer in the latter part of April, 1988 that he believed a conflict existed since the attorney had previously represented a State's witness. At the time of the April 1988 conversation the

retained attorney advised the prosecutor that he would give him facts that would explain away what had been perceived by the prosecutor to be a conflict of interest. At the time he indicated he would present these facts within a week. However, allegedly due to other commitments, the lawyer apparently never presented this information to the prosecutor.

The prosecutor then made a formal motion to disqualify the lawyer. There was no response to this motion by petitioner's lawyer.

The plea and any sentence the State's witness faced became a central issue at the petitioner' s trial. At the time the witness agreed to cooperate with the State, a plea of guilty had been entered but no sentence had been imposed. As part of the trial strategy, the substituted lawyer sought to impeach the witness by showing that the agreement to cooperate with the State was to avoid a prison sentence on the aforementioned drug arrest.

Substituted attorney alleged in his opening statement to the jury that the witness faced five years in jail. At trial, however, the witness testified to no fear of any prison sentence since the removed attorney promised that if the witness pled guilty to the drug charge the witness would not go to jail.

In view of this testimony, it became clear that in order to refute this statement, the witness was promised by the removed attorney that the witness would not go to prison, the lawyer would have been required to testify to the contrary. However, such testimony would have caused the lawyer embarrassment in light of the allegations of conflict and certainly would have resulted in disclosing that the removed attorney was still representing the petitioner in violation of a court order removing him. If it was for this reason that he was not called as a rebuttal witness, it is obvious that the petitioner had been unduly prejudiced by this conflict.

The motion to disqualify the petitioner's attorney eventually came to be heard before the Hon. Steven P. Perskie (trial judge) on the 7th day of September, 1988.

Petitioner has certified that he was not present at this proceeding nor was he ever advised by his lawyer that this application had been made by the State. He has also certified that he was never advised of Judge Perskie's decision affording his retained attorney leave to withdraw from his case. He has also alleged that he did not retain Mr. Cammarata (the substituted lawyer) nor did he agree to his substitution as his attorney. He has certified that Mr. Feinstein never told him the true circumstances of his removal from his case or why Mr. Cammarata was required to represent him during the trial. Mr. Feinstein retained Mr. Cammarata, introduced him as his associate and made the financial arrangements to pay him without the awareness of petitioner. All payments for trial were paid to the removed attorney and no payments were made to the substituted lawyer.

REASONS FOR GRANTING THE WRIT

This petition seeks to address the constitutional right of petitioner to be present and given the opportunity to be heard at a pre-trial conference in which a factual determination was made to remove his retained attorney. Petitioner alleged that he was unaware of this proceeding and further, said attorney continued to collect all trial fees, selected and retained his replacement and remained in control of the case to the ultimate prejudice of petitioner.

Petitioner contends that had he been aware of the conflict alleged by the State, and had he been advised by competent judicial authority of the circumstances causing the removal of his retained attorney, he would have been in a position to retain a new lawyer of his choice and not that of his removed attorney.

Further, petitioner has alleged that the removed attorney had significant and vital evidence to rebut the State's chief witness against him, that no promises were made to the witness by the removed attorney and that she would not go to prison on the unrelated but relevant drug arrest.

This Court has decided various cases involvir ; the right of an accused to be present at proceedings subsequent to his indictment. In *Lewis v. United States,* 146 U.S. 370, 13 S. Ct. 136 (1882) it was held ". . . after an indictment is found, nothing shall be done in the absence of the prisoner."

Later cases dealt with the presence issue at various stages of the trial. In *Snyder v. Massachusetts,* 291 U.S. 97, 54 S. Ct. 330 (1938) presence was required at all trial-related proceedings where such presence had a relation to the fullness of a defendant's opportunity to defend against the charges. In *Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525 (1975), a case involving presence at trial, the Court held such was required when the absence of an accused would frustrate the fairness of the proceedings against him.

Later in *Rusin v. Spain,* 464 U.S. 114, 104 S. Ct. 453 (1983) and *United States v. Gagnon,* 470 U.S. 522, 105 S. Ct. 1482 (1985) the Court decided cases involving the right to be present involving jury questions which arose during the proceedings. These cases involved trial-related matters.

However, this Court appears not to have determined the right of an accused to be present at pre-trial conferences where facts are considered which have the potential of impacting on the fundamental rights of the accused. In this case, the absence of petitioner at a fact finding determination into whether the counsel of his choice should be removed for reasons of alleged conflict deprived him of his right to be heard on this issue. More

importantly, petitioner alleges he was not advised by any competent judicial authority, that his retained counsel had been removed or the reasons for his removal. The trial court apparently relied upon the removed attorney to advise petitioner on these matters. The result was prejudicial to petitioner since the attorney did not remove himself but merely retained a substitute lawyer for him and remained in full control of the case to the prejudice of the petitioner.

The determination of whether an accused presence is required at such pre-trial proceedings appears to be decided on a case-by-case basis. There appears to be no uniformity or judicial guidelines regarding the right to be present at such proceedings. It is clear where matters of scheduling and matters of law are being discussed at such proceedings it may not be necessary for the accused to be present since he would have no appreciable contribution to those matters.

We therefore believe this Court should guarantee that petitioner should have been present at the proceeding to remove his retained counsel. This is especially so since a factual determination had to have been made by the presiding judge to permit such removal shortly before trial of a complex murder and drug prosecution.

In this case the proceedings held in the absence of the petitioner deprived him of the opportunity to retain an attorney of his choice who was not burdened by the conflicts of the removed attorney. In effect, petitioner was being represented by the removed attorney's "of counsel" who was not an independent lawyer free to make the untrammeled choices which would protect the petitioner's right to a fair trial.

The lawyer was burdened by the same conflicts as his predecessor – the result as to deprive petitioner of his

constitutional right to be represented by a conflict-free lawyer of his choice. *Glasser v. United States,* 360 U.S. 60, 62 S. Ct. 457 (1942); *Holloway v. Arkansas,* 435 U.S. 475, 98 S. Ct. 1173; *Cuyler v. Sullivan,* 446 U.S. 335, 100 S. Ct. 1708 (1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 19, 1994

APPENDIX A — ORDER DENYING PETITION OF THE SUPREME COURT OF NEW JERSEY FILED JANUARY 27, 1994

SUPREME COURT OF NEW JERSEY
C-489 September Term 1993
37,713

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PAUL KAMIENSKI,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1577-92 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 25th day of January, 1994.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX B — PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED OCTOBER 19, 1993

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1577-92T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PAUL KAMIENSKI,

Defendant-Appellant.

Argued October 4, 1993 - Decided OCT 19 1993

Before Judges J.H. Coleman and Muir, Jr.

On appeal from Superior Court, Law Division, Ocean County.

Max D. Leifer argued the cause for appellant (Albert J. Brackley, *pro hac vice*, on the brief).

David Millard, Assistant Ocean County Prosecutor, argued the cause for respondent (Dan Carluccio, Ocean County Prosecutor,

attorney for respondent; Andrew Megill, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

This is an appeal by defendant from the denial of his application for post-conviction relief (PCR).

Defendant was convicted of knowing or purposeful murders of Henry and Barbara De Tournay, conspiring to possess and distribute cocaine, possession of cocaine with intent to distribute, and first-degree robbery. We affirmed his convictions but modified his sentence in a decision dated February 19, 1992, and reported as *State v. Kamienski*, 254 *N.J. Super.* 75 (App. Div. 1992). He was sentenced on April 10, 1992, to an aggregate term of life plus twelve years, with thirty-six years of parole ineligibility. The Supreme Court denied a petition for certification on June 26, 1992. 130 *N.J.* 18 (1992).

The PCR was filed on July 7, 1992, seeking a new trial based on assertions related to an alleged conflict which existed with his former attorney, Miles Feinstein, and his trial attorney, Thomas Cammaratta. Defendant asserts that he was not present during pretrial court proceedings related to the alleged conflict. Oral arguments on the PCR application were heard on October 30, 1992. During those proceedings defendant conceded in his certification that he knew about the alleged Feinstein conflict before filing his first appeal, but elected not to raise that issue in his direct appeal. The judge denied the PCR on procedural grounds pursuant to *R.* 3:22-4(a). In addition, the judge considered the merits of the PCR and found that defendant's presence was not required during the Feinstein conflict pretrial proceedings based upon *R.* 3:16 and *State v. Smith*, 29 *N.J.* 561 (1959). Those

proceedings did not touch upon defendant's guilt, innocence or liberty. The judge also found there was no ineffective assistance of counsel by Cammaratta.

On this appeal, defendant raises the following contentions:

POINT I: THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL PURSUANT TO RULE 3:22 DUE TO APPELLANT'S ABSENCE AT A CRITICAL STAGE, TO WIT; THE PROCEEDING TO REMOVE HIS ATTORNEY FOR A CONFLICT OF INTEREST WHICH RESULTED IN DENYING HIM RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL OF HIS CHOICE.

POINT II: TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL PURSUANT TO RULE 3:22 DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL ARISING FROM CONFLICT OF INTEREST.

POINT III: THE COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING TO APPELLANT PRIOR TO DENYING HIS MOTION FOR A NEW TRIAL PURSUANT TO RULE 3:22.

We now affirm the order denying the PCR substantially for the reasons expressed by Judge Campbell in his articulate and well-reasoned oral decision of October 30, 1992. We add only that when Feinstein was granted leave to withdraw as counsel for defendant on September 20, 1988, and Cammaratta was substituted as

counsel for defendant, defendant was free on bail. Thus, his absence, if indeed he did not appear, was not caused by the State.

Affirmed.

APPENDIX C — DECISION OF HONORABLE DONALD CAMPBELL

[Commencing at page 31]

* * *

This motion was brought by the defendant, Paul Kamienski, through Mr. Brackley, who is his attorney.

The issues presented are whether the defendant, Paul Kamienski, is entitled to post-conviction relief in the form of a new trial because of the following allegations: First is that the trial Court removed his original attorney, Miles Feinstein, at a hearing without his being present, without the defendant being present.

Two, that the defendant was unaware of the exact reasons why Mr. Cammarata appeared at his trial — as his trial counsel approximately two weeks before his trial began.

Three, that Mr. Feinstein never actually removed himself from the case, as he worked with Mr. Cammarata on a trial strategy throughout the defendant's trial and appeal.

And four, because Mr. Feinstein remained involved in the case, the conflict, he maintains, was never [32] removed, and the defendant's trial counsel was, therefore, ineffective.

They also maintain that whether or — maintain that an evidentiary hearing is necessary to determine whether the extent of Mr. Feinstein's participation in the defendant's trial and the appeal in order to determine if a conflict of interest existed which denied the defendant effective trial counsel.

Appendix C

Procedural history of this case is as follows: On December 21, 1988, after a lengthy jury trial, the defendant, along with his codefendants, Anthony Alongi and Joe Marzeno, were convicted of the knowing and purposeful murders of Barbara and Henry DeTournay, the felony murders of the DeTournays and two counts of conspiracy to possess cocaine with the intent to distribute.

Prior to sentencing and on a motion of the defendant, Judge Perskie entered a judgment of acquittal, notwithstanding the verdict, in Kamienski's favor, for the murder and felony murder convictions.

Kamienski was sentenced solely on two counts of conspiracy to possess CDS with intent to distribute.

The defendant, along with his codefendants, appealed, and the State cross-appealed.

On February 19, 1992, the Appellate Division reversed Judge Perskie's ruling and reinstated the [33] defendant's murder and felony murder convictions.

On April 10, 1992, this Court sentenced the defendant to two concurrent sentences of 30 years to life for the murder convictions and to 12 years in jail for the cocaine distribution, to run consecutive to the 30-year sentences.

The defendant also appealed this decision, represented by Richard E. Mischel, Esquire; however, he did not include his conflict of interest claim in his appeal.

Miles Feinstein originally represented the defendant. Prior to the defendant's arrest, Mr. Feinstein, it is alleged, also represented

the defendant's girlfriend, Donna Duckworth, who was a witness in the case.

Both the defendant and Ms. Duckworth voluntarily submitted to police interviews in 1983, after the bodies of the DeTournays were discovered. And detectives also interviewed the defendant and his girlfriend in Florida, in the spring of 1984.

Although Mr. Feinstein never represented Ms. Duckworth in any formal court proceeding, it is alleged that he did interview both she and the defendant extensively and represented to the police that Ms. Duckworth was one of his clients.

[34] In October of 1985, the defendant and Ms. Duckworth were arrested and charged with possession with intent to distribute CDS, after the police found cocaine on Mr. Kamienski's boat, which was seized as a result of the arrest.

Both suspects sought to speak with Mr. Feinstein; however, Mr. Joel Miklaki, an attorney, entered an appearance for Ms. Duckworth. The charges against the defendant, Kamienski, were then dropped, and Duckworth pled guilty to possession.

After defendant, Kamienski, and Ms. Duckworth were charged in this case, Ms. Duckworth became a witness for the State, and the State filed a motion to determine whether a conflict of interest existed, due to Mr. Feinstein's past representation of Ms. Duckworth and his present representation of the defendant at trial.

On September 20, 1988, the Court afforded Mr. Feinstein, quote, "Leave to withdraw as counsel for defendant."

Mr. Feinstein then voluntarily withdrew from the case.

Appendix C

The defendant may not have been present at the proceeding where the Court determined Mr. Feinstein's conflict and resulting removal.

That fact is not conceded by the Prosecutor; [35] however, I will assume, for the purpose of this decision, that he was, in fact, not there, despite the fact I recognize that the State doesn't concede that.

On September 30, 1988, a substitution of attorney was filed, reflecting Mr. Feinstein's replacement by Mr. Thomas J. Cammarata, who represented the defendant at trial.

The defendant's trial began on October 18, 1988, and lasted until December 21st, 1988, when the jury returned a verdict of guilty.

The defendant claims that Mr. Feinstein did not, in reality, remove himself from the case and continued working with Mr. Cammarata regarding the strategy of his case throughout trial and the appeal.

The defendant argues four principal things: First, that the defendant is not barred by Rule 3:22-4, because Mr. Feinstein allegedly assisted in the defendant's appeal, and that the defendant, therefore, could not raise the issue of conflict in a prior proceeding, even though he admitted to learning about the conflict after his conviction.

Two, that the defendant was denied his fundamental right to a fair trial by failure of the Court to inform him or require his presence at a hearing, removing Mr. Feinstein on the basis of conflict.

Appendix C

[36] Three, that the defendant was denied his due process right to a fair trial, because Mr. Feinstein failed to remove himself from trial, and had the defendant known of the reasons behind the conflict, he would have ended Mr. Feinstein's involvement in the case.

And four, that the defendant is entitled, at least, to an evidentiary hearing to determine the facts and circumstances regarding the conflict and its effect on the defendant's right to a fair trial.

The State argues that: Number one, the claims are barred by Rule 3:22-4, because he could have raised the conflict issue and denial of due process issue on appeal.

Secondly, that even if the defendant's claims are not barred by Rule 3:23 — correction, 22-4, the defendant's presence at the pre-trial hearing was not required, nor was the Court required to formally tell the defendant of the reasons for Mr. Feinstein's withdrawal.

Three, that the defendant has failed to show that Mr. Feinstein continued to partake in his trial and Appellate strategy. And even if he had made the requisite showing, no prejudice would have resulted, because Mr. Feinstein's knowledge could only benefit the defendant's case.

Four, that a full evidentiary hearing on this [37] matter is unwarranted, because the defendant has not presented a prima facie claim of ineffective assistance of counsel.

The analysis I've made is as follows: The defendant does not meet any exceptions to the 3:22-4(a) bar to post-conviction relief claims.

Appendix C

Court Rule 3:22-4 states that: If the grounds for post-conviction relief could have been heard at a prior proceeding, the defendant is precluded from raising them, unless the claim could not have reasonably been raised in the prior proceeding.

Enforcement of the bar would lead to a fundamental injustice; or denial of relief would be contrary to the defendant's constitutional rights.

The defendant claims that even though Mr. Feinstein withdrew from the case, he was fully involved in the defendant's trial. Specifically, the defendant states that Mr. Feinstein prepared him for his trial testimony, and that Mr. Feinstein told the defendant that he would advise Mr. Cammarata on how to proceed.

The defendant further states that he never actually retained Mr. Cammarata, and I refer to the defendant's Certification at pages seven and eight.

The defendant has not offered any Certifications or Affidavits from either Mr. Feinstein or Mr. Cammarata [38] regarding Mr. Feinstein's alleged control over the defendant's case; however, the defendant offers cancelled checks made out to Mr. Feinstein subsequent to the trial, amounting to approximately $70,000, as proof that Mr. Feinstein was still involved in the case.

The defendant's Certification, page four, Exhibit E is where I found that.

The defendant also offers checks made out to Mr. Cammarata in December of 1988 and March of 1989, totaling approximately $20,000 which he alleges were only for the purpose of obtaining trial transcripts.

Appendix C

The defendant admits that he knew that Mr. Feinstein could not represent him at trial, although it is not clear that he knew the reasons.

The defendant states that he thought Mr. Feinstein was disqualified because he was a potential rebuttal witness in the defendant's case.

I refer you to page nine of the defendant's Certification.

The defendant further claims that after his convictions were reinstated in the Appellate Division, Mr. Feinstein and Mr. Cammarata referred to the defendant —correction, referred the defendant to Mr. Richard E. Mishcel for the purpose of preparing his appeal.

I refer you to page 10 of the defendant's [39] Certification.

The defendant admits that he learned of the true facts surrounding Mr. Feinstein's conflict after his conviction and while preparing for his appeal.

The defendant believes that Mr. Feinstein was disqualified because of his inability to cross-examine Ms. Duckworth, in light of his prior representation of her.

I refer you to page nine of the defendant's Certification.

However, the defendant states that he did not raise the conflict issue on appeal, because his attorneys assured him that his appeal looked successful and that the conflict issue could be raised at any time.

Appendix C

I refer you to pages two and ten of that Certification.

The defendant cites the case of *State versus Preciose,* spelled P-R-E-C-I-O-S-E, at 129 . . .

The cite of that case is 129 New Jersey 451. That's a 1992 case, for the — which stands for the proposition that ineffective assistance of counsel claims are particularly suited for post-conviction relief, because they often cannot be reasonably raised at a prior proceeding.

I refer you to the defendant's letter memorandum [40] dated October 26, 1992, on page one.

The Court in the *Preciose* case reasoned that ineffective assistance of counsel claims often fit the 3:22-4(c) exception to the Subsection (a) bar, because the layman cannot — or often cannot recognize trial counsel's errors until after trial, when he consults with other lawyers, or after his direct appeal, if he retains his trial counsel for the appeal.

Preciose case also cites the *Kimmelman versus Morrison* case at 477 US 365 at page 378. That's a 1986 case.

The Court further reasoned that ineffective assistance of counsel claims are rarely barred from postconviction review because of the New Jersey Courts' general policy of declining to entertain ineffective assistance claims on direct appeal, because such claims involve allegations and evidence outside of the trial record.

Again, I cite the *Preciose* case, which cites other cases.

Appendix C

However, the defendant, along with his attorneys, was fully aware that Mr. Stein — Mr. Feinstein's conflict before his direct appeal. See the defendant's Certification on page two and ten.

Moreover, the defendant's motion for [41] post-conviction relief is essentially based on information available in the record developed at the trial, including: (a) The trial Court's failure to require the defendant to be present at the conflict determination and to inform him of the reasons for Mr. Feinstein's removal; and (b) Mr. Cammarata's alleged inability to cross-examine Ms. Duckworth fully on her 1985 guilty plea to possession because of Mr. Cammarata's relationship with Mr. Feinstein.

Furthermore, precluding the defendant from proceeding would not result in a fundamental injustice.

Rule 3:22-4(b).

The Subsection (b) exception is only applied in exceptional circumstances, and the defendant has the burden of showing that the violation deprived him of a fair proceeding and a just outcome, and that the violation played a role in the determination of the defendant's guilt or innocence.

I cite the case of *State versus Mitchell,* M-I-T-C-H-E-L-L, at 126 New Jersey 565, at page 587, that's a 1992 case; and in the case of *State versus Cerbo,* C-E-R-B-O, at 78 New Jersey 595 at page 605, that's a 1979 case.

The defendant has not shown that Mr. Feinstein's alleged control of his case played a role in the [42] determination of his guilt, nor has he shown any real deficiency in Mr. Cammarata's performance at trial.

Appendix C

And I cite the defendant's own Certification and his brief and the defendant's supplemental brief.

I also cite the trial transcript of the Cross-Examination of Donna Duckworth.

Finally, not only does the defendant fail to state a constitutional claim under Rule 3:22-4(c), but his claims are meritless; therefore, the defendant's claim is barred under Rule 3:22-4(a) and must be denied.

Even if the defendant is not barred under Rule 3:22-4(a), his motion must be denied.

The defendant was not denied his fundamental right to a fair trial because he was not present or formally told of the reasons Mr. Feinstein, his original counsel, was disqualified.

The accused has the right to be present at every stage of the trial. That's Rule 3:16, and I cite the case of *Snyder versus Massachusetts* at 291 US 97.

The defendant claims that the hearing disqualifying Mr. Feinstein was a critical stage of the trial, and therefore, the defendant should have been present. And I cite the defendant's brief at page 6.

The defendant relies on the case of the *United States versus Tatum,* T-A-T-U-M, at 943 Fed. 2d 370 at page [43] 379. That's a 1991 case in which the Court of Appeals for the 4th Circuit stated that where there is a possible conflict of interest, the Court has the responsibility to investigate further, to advise the defendant personally, and to receive a knowing waiver if that is the express wish of the defendant.

However, the instant case is wholely different than the circumstances in *Tatum.*

In *Tatum* the government notified the Court of a possible conflict with the defendant's counsel, and the Court simply ignored the conflict and proceeded with trial. The 4th Circuit found that this was reversible error.

In this case the State made a pre-trial motion to remove Mr. Feinstein because of Mr. Feinstein's presence — because Mr. Feinstein's presence would prejudice the State's case and affect his loyalty to his former client, Ms. Duckworth.

I refer you to the defendant's brief, Exhibit B, showing a Certification by Mr. Millard, relying on a motion for disqualification of Patrick McGahn, M-C G-A-H-N, and I cite the case of *State versus Castonoso,* K-A-S — correction, C-A-S-T-O-N-O-S-O, at 22 New Jersey Super. G41 and at page 645. That's a 1987 Law Division case that is analogous to this case.

[44] This was not a critical stage in the trial; rather, it was a pre-trial hearing that did not require the defendant's presence or formal notification, despite the fact that, in my belief, it would have been preferable, had he been there.

Moreover, the language in *Tatum* seems to indicate that the Court must notify the defendant of a potential conflict in order to see if he wishes to enter a knowing waiver and continue with the representation.

I cite the case of *State versus Bellucci,* B-E-L-L-U-C-C-I, at 81 New Jersey 545. That's a 1980 case, which holds that multiple representation — that when multiple representation is involved,

the situation must be explored on the record, both to ensure that the defendant is aware of the potential hazards and to secure a proper waiver.

In this case, even had the Court notified the defendant formally of the conflict, the defendant's waiver would not have been effective, because Mr. Feinstein's representation would have affected the State's case rather than the defendant's, and I cite the case of *State versus Catanoso,* C-A-T-A-N-O-S-O, again.

In that case, the defense counsel was disqualified where he had previously represented the business of which the State's primary witness had been president, regardless [45] of the offer to waive his Sixth Amendment right to confront the witness.

Furthermore, the constitutional right of the defendant to be present at trial applies to formal proceedings affecting the defendant's guilt or innocence. I cite the case of *State versus Bentley,* B-E-N-T-L-E-Y, at 46 New Jersey 193, at page 204. That's a 1957 case.

See also the case of *State versus Smith* at 29 New Jersey 561. That' s a 1959 case and was cited by the State in its brief.

The disqualification proceeding did not affect the defendant's guilt or innocence; rather, it was a hearing 13 to determine whether or not Mr. Feinstein's presence as trial attorney would adversely affect the State's case or conflict with his duty of loyalty to his previous client, Ms. Duckworth.

The other cases cited by the defendant relate to his fundamental right to confront witnesses against him.

Appendix C

I cite the defendant's brief at page 6 and cite the case of *State versus Ogbourne,* spelled O-G-B-O-U-R-N-E, at 235 New Jersey Super. 113.

That's a 1989 Appellate Division case which requires the defendant's presence at an in-camera hearing mandated by a Rape Shield Law.

[46] The case of *State versus Fann,* F-A-N-N, at 239 New Jersey Super. 507, that is a 1990 Law Division case which holds that the defendant has the right to be present at a bail setting and bail review hearing.

In this case the defendant was not denied his right to confrontation because of his absence from the removal hearing.

Finally, even if the defendant should have been informed by the Court of Mr. Feinstein's conflict, he was informed by Mr. Feinstein that he could not appear with him at the trial. He accepted Mr. Cammarata as trial counsel and even sought an adjournment so that Mr. Cammarata could prepare for trial.

The defendant's supplemental affidavit, page two, is cited.

The defendant has not provided the Court with any evidence, besides his cancelled checks, that he did not realize Mr. Feinstein could not further serve as his counsel. And any possible error on the part of the trial Court was harmless.

And I see — I cite, rather, Rule 2:10-2, which articulates the harmless error standard.

In any event, gentlemen, for all of the — although there is no

proof of Mr. Feinstein's continued participation in the defendant's case, if Mr. Feinstein [47] had advised Mr. Cammarata outside of court, Mr. Cammarata's representation would still not amount to ineffective assistance of counsel.

The defendant claims that because Mr. Feinstein never actually withdrew from the case, Mr. Cammarata was ineffectively able to pursue his case, and thus, the defendant was denied a fair trial.

The defendant states that this Court should apply a presumption of prejudice to the defendant's case, based on the holding in *Bellucci,* which I've already cited, and the case of *State versus Ebinger,* E-B-I-N-G-E-R, at 97 New Jersey Super. 23, that a per se rule applies to this type of case, so that the prejudice will be presumed in the absence of a waiver.

However, the *Bellucci* case and the *Ebinger* case were cases in which conflicts were found because of counsel's multiple representation of codefendants with adverse interests.

The case at bar is not such a case.

In this case the conflict was removed with Mr. Feinstein's withdrawal. Mr. Cammarata did not personally represent Ms. Duckworth, and the defendant has offered no proof of Mr. Cammarata's association with Mr. Feinstein that would prove Mr. Cammarata was unable to vigorously cross-examine her.

[48] The State contends that the prejudice is only presumed in the most outrageous of cases.

I cite the case of *State versus Savage*, where the Court held

that the per se analysis in an ineffective assistance case is reserved for those instances where counsel's errors were so great that no amount of showing of want of prejudice could cure it.

I cite again the *Savage* case, which also cites the *Strickland versus US* case at 466 US 668, at page 692, that's a 1984 case; and the case of *United States versus Cronic,* C-R-O-N-I-C, at 466 US 648, at page 659, that's a 1984 case.

The New Jersey Supreme Court has adopted the *Strickland/Cronic* standards in the case of *State versus Fritz,* which I cite at 105 New Jersey 42 at page 49. That's a 1987 case.

It is clear that the defendant was not constructively denied counsel, to fit into the per se analysis, because of Mr. Feinstein's — the conflicted attorney's removal from the case, and that the defendant accepted Mr. Cammarata as his trial counsel. Therefore the defendant must meet the two-pronged *Strickland/Cronic/Fritz* test in order to show that Mr. Cammarata's performance was actually ineffective.

This requires the defendant to show: One, that [49] counsel's performance was deficient; and two, that the counsel's errors were so prejudiced the defense —prejudicial to the defense that there is a reasonable probability, but for counsel's unprofessional errors, that the result of the proceeding would have been different.

Again, I cite the *Fritz* case.

The defendant has not shown that counsel's performance was deficient, nor has he shown that the requisite prejudice required under *Fritz* existed.

Appendix C

The defendant states that Mr. Cammarata's performance was deficient because he came into the trial at such a late date, approximately 18 days before the trial commenced; and also, because he could not effectively cross-examine Ms. Duckworth as a result of the dual representation of Mr. Feinstein and Mr. Cammarata.

And I cite the supplemental affidavit submitted by the defendant at page two and the defendant's brief at page 12.

However, it is well-settled that the Courts have rejected ineffective assistance claims grounded on the trial counsel's inadequate preparation. Again, I cite the *Preciose* case.

In any event, however, Mr. Cammarata had two weeks to prepare for the defendant's trial, along with the alleged aid of Mr. Feinstein; therefore, the defendant's [50] claim of inadequate trial preparation is, in my opinion, meritless.

Furthermore, it is clear from the record that Mr. Cammarata zealously cross-examined Miss Duckworth on all aspects of her testimony. In fact, he impeached her credibility many times by showing that she had lied to the authorities on numerous occasions.

Moreover, Mr. Cammarata questioned Ms. Duckworth regarding her 1987 plea of guilty resulting from her 1985 arrest for possession of CDS with intent to distribute.

Although Mr. Cammarata did not question Ms. Duckworth specifically about supposedly, quote, "taking the rap," end quote, for Mr. Kamienski, he did elicit testimony that she was told by the attorneys that she would not be going to jail.

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I cite the transcript at page 207.

It is not clear that had Mr. Cammarata elicited an admission by Ms. Duckworth that she was forced to plead guilty to protect the defendant, that such testimony would have further impeached her credibility.

Finally, if Mr. Cammarata was even armed with this information resulting from his alleged association with Mr. Feinstein, it was his strategy and his choice to use the information as he saw fit and should not now become a basis to set aside the defendant's conviction.

[51] And I cite the *State versus Purnell* case at 126 New Jersey 518 at page 534. That's a 1992 case.

The Court held there that where the defense counsel has previously represented the State's key witness in a drug case, and the previous case was unrelated to the instant case, and defense counsel appeared to vigorously cross-examine the witness, that no prejudice existed.

Therefore, contrary to the defendant's contentions in his numerous briefs, it is my finding that he suffered no prejudice from Mr. Cammarata's representation.

In fact, the State maintains that any information received from Mr. Feinstein would have helped the defendant's case rather than hurt it.

Mr. Cammarata was not forced to choose between betraying Ms. Duckworth's confidence - as Mr. Feinstein may have been as the trial counsel - and his duty to defendant to vigorously cross-examine Ms. Duckworth.

Appendix C

Because of the defendant — the defendant's failure to make a prima facie showing of ineffective assistance of trial counsel, he is not entitled to an evidentiary hearing on the issue.

Evidentiary hearings on motions for Post-conviction relief are not required.

In *Preciose,* at 129 New Jersey 462, the Court stated that if a defendant presents a prima facie claim of [52] ineffective assistance, the trial Court should grant an evidentiary hearing to resolve the claim.

However, in order to make such a showing, the defendant must demonstrate a reasonable likelihood of succeeding under the *Strickland/Cronic/Fritz* test.

As stated above, the defendant has not shown that he would likely succeed under the *Strickland* test, and therefore, an evidentiary hearing is not warranted.

I also cite the case of *State versus Odom,* O-D-O-M, at 113 New Jersey Super. 186.

That's a 1971 Appellate Division case, holding that post-conviction relief petitions asserting vague denials of due process are insufficient to warrant the evidentiary hearing requested in this case.

I, therefore, deny the defense motion.

Thank you.

MR. BRACKLEY : Can I get a copy of that, Judge?

Appendix C

THE COURT: I'm not going to give you a copy of the notes, you can get a copy of the transcript though.

MR . BRACKLEY: All right. Thanks.

(Matter concluded.)